

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1 GREG LEE, ) No. C 06-6564 SBA (pr)  
2 )  
3 Petitioner. ) **ORDER DENYING CERTIFICATE**  
4 ) **OF APPEALABILITY**  
5 )  
6 v. ) (Docket no. 21)  
7 MIKE EVANS, Acting Warden, )  
8 )  
9 Respondent. )  
10 \_\_\_\_\_ )  
11 )  
12 )  
13 Petitioner, proceeding pro se, filed a petition for a writ of habeas corpus pursuant to title 28  
14 U.S.C. § 2254. The Court granted Respondent's motion to dismiss the petition as untimely.  
15 Petitioner has filed a letter stating that he was "now contacting [the Court] with a request for a  
16 certificate of appealability as well as a notice of appeal." (Apr. 10, 2008 Letter at 1.) Any document  
17 that clearly evinces an intent to appeal and is otherwise sufficient under Federal Rule of Appellate  
18 Procedure 3(c) may be construed as the functional equivalent of a notice of appeal. See Smith v.  
19 Barry, 502 U.S. 244, 245 (1992). Petitioner's signed letter dated April 10, 2008 evinces an intent to  
20 appeal and is otherwise sufficient to be considered a notice of appeal. See id. at 248; Fed. R. App. P.  
21 3(c). Therefore, Petitioner has filed a timely notice of appeal, which this Court construes also as an  
22 application for a certificate of appealability (COA). See United States v. Asrar, 116 F.3d 1268, 1270  
23 (9th Cir. 1997); 28 U.S.C. § 2253(c)(3).  
24  
25 A petitioner may not appeal a final order in a federal habeas corpus proceeding without first  
26 obtaining a COA. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). Section 2253(c)(1) applies to an  
27 appeal of a final order entered on a procedural question antecedent to the merits, for instance a  
28 dismissal on statute of limitations grounds. See Slack v. McDaniel, 529 U.S. 473, 483 (2000).

"Determining whether a COA should issue where the petition was dismissed on procedural

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1 grounds has two components, one directed at the underlying constitutional claims and one directed  
2 at the district court's procedural holding." Id. at 484-85. "When the district court denies a habeas  
3 petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a  
4 COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable  
5 whether the petition states a valid claim of the denial of a constitutional right and that jurists of  
6 reason would find it debatable whether the district court was correct in its procedural ruling." Id. at  
7 484. As each of these components is a "threshold inquiry," the federal court "may find that it can  
8 dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose  
9 answer is more apparent from the record and arguments." Id. at 485. Supreme Court jurisprudence  
10 "allows and encourages" federal courts to first resolve the procedural issue, as was done here. See  
11 id.

12 The Court has reviewed its Order Granting Respondent's Motion to Dismiss. The petition  
13 was dismissed because the statute of limitations deadline was May 8, 1999, this petition was not  
14 filed until October 13, 2006, and Petitioner's arguments against dismissal -- that circumstances  
15 warrant equitable tolling or a delayed commencement of the limitations period to save the petition  
16 from being untimely -- were unavailing. Because jurists of reason would not find this conclusion  
17 debatable or wrong, the request for a COA is DENIED.  
18

19 The Clerk of the Court shall forward to the Ninth Circuit Court of Appeals the case file, the  
20 Court's Order Granting Respondent's Motion to Dismiss, and this Order. See Asrar, 116 F.3d at  
21 1270).

22 This Order terminates Docket no. 21.

23 IT IS SO ORDERED.

24 DATED: 2/20/09

  
25 SAUNDRA BROWN ARMSTRONG  
United States District Judge

26  
27  
28 UNITED STATES DISTRICT COURT

United States District Court  
For the Northern District of California

1 FOR THE  
2 NORTHERN DISTRICT OF CALIFORNIA  
3  
4

5 GREG LEE,  
6 Plaintiff,  
7 v.  
8 EVANS et al,  
9 Defendant.

Case Number: CV06-06564 SBA

**CERTIFICATE OF SERVICE**

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
12 Court, Northern District of California.

13 That on February 20, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said  
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
15 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
located in the Clerk's office.

17 Greg Lee K90835  
18 Salinas Valley State Prison  
19 P.O. Box 1050  
Soledad, CA 93960

20 Dated: February 20, 2009

21 Richard W. Wieking, Clerk  
By: LISA R CLARK, Deputy Clerk  
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